UNITED STATES
v.
MELVIN McCORMICK

IBLA 72-216 Decided September 29, 1976

Appeal from decision of Chief Administrative Law Judge L. K. Luoma declaring portions of three placer mining claims valid, and declaring a fourth placer mining claim and 18 lode mining claims invalid.

Affirmed.

1. Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Locatability of Mineral: Generally

   A deposit of rhyolite and dacite stone, used in the manufacture of asphaltic concrete and as sealcoating on asphalt pavement, which occurs in a naturally crushed state, which has been roughly stratified and naturally sorted by the forces of nature to an extent that is not found on any other material source in the area, which has little or no overburden, and which affords specification material at a cost significantly below that incurred for the production of any other aggregate from sources in the same market area, has special and distinct physical properties which give it distinct special economic value, and therefore it is locatable as an uncommon variety under the general mining law, and its appropriation is not barred by 30 U.S.C. § 611 (1970).

2. Mining Claims: Common Varieties of Minerals: Special Value

> In determining whether a deposit of mineral aggregate is a common variety where it is used for the same purposes for which common, ordinary aggregates are used, the deposit must be shown to have some rare or unique physical property which gives the material a special and distinct value for such use. Special and distinct value may be reflected by a higher market price in comparison with other aggregates or, alternatively, by reduced costs of overhead so that the profit to the producer would be substantially more while the market price remained competitive with material from other sources.

APPEARANCES: Richard L. Fowler, Esq., Office of the General Counsel, United States Department of Agriculture, Albuquerque, New Mexico, for appellant; Hale C. Tognoni, Esq., Phoenix, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Forest Service, Department of Agriculture, has appealed from the November 23, 1971, decision of Chief Administrative Law Judge L. K. Luoma in which he declared portions of the Oleary Nos. I, II, and III placer mining claims valid, the Lucky Four placer claim invalid, and the Curley Nos. 1 through 18 lode claims invalid.

On October 10, 1961, Melvin McCormick recorded location notices for the Oleary I, II, and III placer mining claims and on June 18, 1962, he recorded a location notice for the Lucky Four claim (Ex. 1). The claims are situated in the Coconino National Forest approximately 14 miles northeast of the city of Flagstaff, Arizona. On November 15, 1968, McCormick filed a patent application (Ex. 8) for the four placer claims. At the request of the Forest Service, the BLM issued a complaint on April 25, 1969, seeking the cancellation of the claims. After the complaint was issued, McCormick located the Curley Nos. 1 through 18 lode claims over substantially the same ground covered by the placer claims. Thereafter, the Government's complaint and the contestee's answer were amended by stipulation of the parties in order to include the lode claims within the placer claim contest. The complaint, as amended, charged the following:

> (1) The material found within the limits of the Oleary Nos. I, II, III and Lucky Four placer mining claims is not a valuable mineral deposit under 30 U.S.C. 611.

(2) The land embraced within the limits of these claims is nonmineral in character within the meaning of the mining laws.

(3) A valid mineral discovery as required by the mining laws does not exist within the limits of the Curley Nos. 1-18 lode mining claims.

A hearing on the matter was held on December 1, 2, and 3, 1970, in Flagstaff, Arizona, and on January 19 and 21, 1971, in Phoenix, Arizona. Thereafter, in his decision dated November 23, 1971, Chief Judge Luoma determined that: (a) a discovery of a valuable deposit of uranium had not been shown to exist on any of the lode claims and, thus, the Curley Nos. 1-18 lode claims were null and void (Dec. at 18); (b) neither block pumice nor pozzolan had been shown to support a valid discovery on any of the placer claims (Dec. at 20); (c) the contestee's deposit of mineral aggregate is unique in the Flagstaff market area, and by virtue of its uniqueness brings to the producer at the pit a price that is higher than that received by competing producers and, thus, the deposit contains an uncommon variety of material within the purview of section 3 of the Act of July 23, 1955 (Dec. at 23); (d) based upon the character of the mineral aggregate, its marketability, and bona fides in development and production, valid discoveries have been established on the Oleary Nos. I, II, and III claims, but the proof to support a discovery on the Lucky Four claim is inadequate (Dec. at 25); (e) the four 10-acre subdivisions which comprise the northern half of the Oleary No. III claim are nonmineral in character (Dec. at 25); (f) based on past production and future market demand, of the remaining 200 acres the deposit is deemed valuable to the extent of 120 acres and any area in excess of that is deemed nonmarketable in the reasonably foreseeable future, and therefore, nonmineral in character under the 10-acre rule (Dec. at 26); and (g) patent may issue assuming the application in other respects is in proper order (Dec. at 27).

On appeal, the issue presented by the Government is whether the Administrative Law Judge was correct in his determination that the mineral aggregate found on the placer claims is an uncommon variety under the Act of July 23, 1955, and if so, whether a discovery based on such mineral aggregate has been perfected on one or more of the Oleary Nos. I, II or III placer claims. The appellee, in his response to the Government's statement of reasons on appeal, maintains that the decision below was correct in its entirety. Our examination of the evidence of record leads us to the conclusion that Chief Judge Luoma was correct in his determination that the contestee had established the existence of valuable discoveries of uncommon variety mineral aggregate on portions of three of the placer claims.

Essentially, this is a one-issue case. There can be no disputing that the material meets the specifications set by various state, federal and local authorities for street, highway and airport projects. There is no doubt that there is an active market which will not merely accept the material from these claims, but will actually prefer it in most circumstances. The locators' ability to make a profit is unquestioned. The principal witness for the Forest Service, Robert E. Wilson, an engineer of mines and geology, repeatedly made flat assertions that McCormick would be prudent to proceed with the mining of the claims if the material is locatable under the mining law.

That, then, is the principal issue. Is this a common variety mineral material which is precluded from claim and appropriation by the Act of July 23, 1955, 30 U.S.C. § 611 (1970), or does the material represent an uncommon variety of stone or gravel which is subject to location under the general mining laws?

The material is rhyolite and dacite stone deposited near the mouth of a volcanic crater (Robinson Crater). The stone has been crushed by the forces of nature in such a way that 80 to 95 percent is of the proper size for various uses in road construction and paving projects. The natural crushing gave the stone the added attributes of angular edges and flat plane surfaces and a natural cleanliness, all of which are necessary to insure good adhesion in asphalt. The witnesses for both sides agree that the fragments of rock were loosened from the rock in place and moved, probably by a combination of gravity and by the sheet action of water flowing off the peaks. As a consequence, the broken material on the Oleary claims is roughly stratified and naturally sorted to an extent that does not exist on any other material sources in the area (Tr. 35, 518). Wilson described these qualities as "distinguishing physical properties" by which the subject deposit is different from other such deposits in the San Francisco area (Tr. 35). Thus the contestant acknowledged that, although used for the same purposes as common variety mineral materials from other deposits, this deposit "has distinct and special properties," one of the two criteria which must be met in order to classify the deposit as other than a "common variety." The salient provision of 43 CFR 3711.1(b) states:

> (b) "Common varieties" includes deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Mineral materials which occur commonly shall not be deemed to be "common varieties" if a particular deposit has distinct and special

> properties making it commercially valuable for use in a manufacturing, industrial, or processing operation. In the determination of commercial value, such factors may be considered as quality and quantity of the deposit, geographical location, proximity to market or point of utilization, accessibility to transportation, requirements for reasonable reserves consistent with usual industry practices to serve existing or proposed manufacturing, industrial, or processing facilities, and feasible methods for mining and removal of the material. * * * [Emphasis added.]

It being established that the subject deposit is possessed of the requisite "distinct and special properties," we need only ascertain whether those properties afford the deposit "a distinct, special economic value."

The natural crushing, stratification and sorting of the material has indeed lent the deposit a special, distinct value over any other known source of material for this purpose with a radius of at least 50 miles from Flagstaff, Arizona, which is considered to be center of the market area served by these several deposits.

The principle products of the Oleary claims are: (1) aggregate base course material (ABC); (2) mineral aggregate for asphalt cement (MA); and (3) sealcoating chips, included in a special surface topping which is applied to finish asphalt paving. Each of these products is utilized separately in different stages of road building and must meet different specifications. Each has been naturally sorted and segregated on the Oleary claims.

The first witness for the contestees was H. Arthur Kennedy, retired Director of Public Works for the City of Flagstaff, who had served in that capacity for 6 years, prior to which he was Street Superintendent of that city for 29 years. He testified that aggregate for paving was extremely scarce in the Flagstaff area and that until about 1962 the City of Flagstaff had to ship aggregate from Phoenix in carload lots to meet its paving requirements. Later they began using material from the nearby Fisher pit, which yielded a limestone-like rock that had to be quarried and crushed, after which they began to use material from the Oleary claims. Kennedy testified that the contested claims yielded material that was of high quality, required no crushing, and could be used pit-run by the simple expedient of putting an "A-frame screen" on the truck to screen out the oversize pieces of 3 and 4-inch dimension. No other processing was done. He said that he had used basalt and limestone and malapai rock which was crushed to specification by the city in a city-owned crusher, but the cost of producing the aggregate from those materials was so high that it was prohibitive. It even exceeded the cost of shipping the material in

from Phoenix, which is 136 miles from Flagstaff. Kennedy also said that he had tried using volcanic cinders, which are present in the area in tremendous quantities, but found that not only were the cinders inferior in quality but required such greater quantities of oil that the cost was excessive. He testified that he had used material "from practically out of every pit that has been opened [in the area] up until 1965" (Tr. 90).

Moreover, Kennedy stated that many of the competing materials were subject to "stripping" from the road, a process of deterioration caused by wear and weather which is characterized by the separation of the rock particles from the bonding agent in long strip-like patches on the road surface. At the time of the hearing Kennedy said the streets paved with material from the Oleary claims had been in service for as long as 8 or 9 years without stripping, including the block in front of the city maintenance shop, which is subject to a heavy volume of truck traffic. To the best of Kennedy's recollection, the City of Flagstaff paid 35 cents per yard for material from the Oleary claims, purchased in place, and loaded, screened and hauled from the pit at city expense. He said:

> There was very little screening to do. As I said, we had an "A-frame on our trucks and we had a skip loader, and we would run this one truck under there and we would load it and screen it down this A-frame. When that truck was loaded, we would take the skip loader and pull her over on the other truck and load it. That is kine of explaining how we got the material out [Tr. 92].

Melvin McCormick, one of the locators, testified that he has been engaged in producing mineral materials since boyhood when they used teams of horses and later trucks with solid tires. He had hauled sand and gravel out of a river bed and leased a pit from which he produced for a long time. He had also located other mining claims for such materials in the late 1920s and early 1930s. Prior to locating the subject claims he had operated 5 or 6 years from one pit and more than 2 years from another pit, both on unpatented claims.

McCormick testified that he had found this material in 1945 while deer hunting. Later he went back and dug some holes, "a bunch of them," and found what he regarded as "an awful good grade of aggregate." However, he was then engaged in the house moving business, "and the house moving was so good that I didn't have time to fool with sand and gravel, so for a number of years I just stayed with the house moving business." About 1960 or 1961 his son took over that business, whereupon McCormick took some samples of the material to Arthur Kennedy, who, after examining the site, told

McCormick that if McCormick would strip off the overburden the city would buy some of the material. This McCormick did, utilizing a piece of heavy equipment (Tr. 100).

Although he had located mining claims for the material (in association with other locators, apparently family members), McCormick testified that he was persuaded by his wife that their religion required them to share with the Government what they took from the ground. (McCormick was then a recent convert to his wife's faith, the Baha'i.) Accordingly, in 1963 he went to the Forest Service and offered to pay 5 cents a yard. The Forest Service requested 10 cents, and McCormick agreed, whereupon the Forest Service issued him a mineral lease to produce the material for 5 years, with a provision for renewal for a second 5-year term (Tr. 103, Ex. No. 5).

McCormick then sold materials from the claims on this basis until 1968, when the Forest Service refused to renew the lease. Although he had applied for a patent in 1967, the Forest Service asserted that the mining claims were invalid and forbade further removal of material. Nonetheless, McCormick continued the removal of material, relying on the validity of the claims, until Forest Service personnel barricaded the access road and threatened McCormick and others with arrest. They also wrote letters to McCormick's customers, advising that the removal of the material was unlawful.

McCormick testified that after considerable agitation the Forest Service recanted to the extent that they allowed him to resume sales of the material on condition that he pay 17 cents per cubic yard royalty into an escrow fund on all sales up to 20,000 yards and 22 cents per yard on all sales in excess of 20,000 cubic yards. McCormick charged his customers 36 cents per yard.

McCormick testified that at the time the Forest Service closed down his operation he had $ 25,000 to $ 30,000 invested in roads, excavations, stripping and other development.

With regard to the special nature and value of the deposit, McCormick testified that it is "crushed rock in place -- crushed by nature," and it "is a first class mineral aggregate for concrete mix, asphalt mix, just practically any use you have mineral aggregate used for." He attributes this to the fact that the material has been fractured with square sides and sharp points which give it better adhesive qualities when used with road oil, concrete or asphalt. He said that contractors are paying 36 cents for material from the Oleary claims, and no other aggregate in the area comes anywhere near commanding that high a royalty.

He noted that a similar kind of aggregate is produced from the nearby Fisher pit, but it must be quarried and processed. Material

from the Oleary claims requires no drilling, blasting, crushing, sorting, blending or additives, and there is little waste. By contrast he said:

> On the other hand, you go over to the Fisher pit, they have to drill that and shoot it and then process it through a crushing plant and a screening plant to size it, and in the process it gets dust on the material and when they use it they have to put an anti-stripping compound with it so it won't strip * * * to get a perfect material out there they have to blend fines with it. They've got sand right there that they have to blend right in with this material [Tr. 159].

He described another source of material in the area, the Summit pit. There, he said the material is too fine and rounded, "* * * there is not enough coarse material in it" (Tr. 159). McCormick testified that he calculated that he could market 800,000 tons of the material over the next 20 years, presuming that he supplied about one-half the Flagstaff market (Tr. 483).

James D. Felix testified for the contestees. He is a construction contractor engaged in the business of building secondary roads, parking lots and doing site work for commercial buildings. He was formerly employed for 10 years by the Arizona Highway Department, first as an equipment operator and then as supervisor of a crew which explored for and tested road materials, primarily in northern Arizona. He left the highway department in 1967.

Felix testified that he believes he has inspected and tested material from every pit in the area of Flagstaff within a radius of 50 miles, a minimum of 100 pits, not counting borrow pits. He stated that it is very difficult to find materials in the area which meet the federal specifications set by the Bureau of Public Roads. He added:

> Out of pretty near anything you can actually make a material to specification. It is the cost factor, you know. I can take malapai and make a spec material of it, but our costs were way up on producing this material [Tr. 218].

Felix tested the material on the subject claims, sinking 13 test pits (Exh. No. 31, Tr. 218). Samples were shipped to a Phoenix testing laboratory. The material was acceptable to meet highway standards.

Since leaving the highway department Felix has used materials from the claims in his contracting business. He states:

> Well, actually the best qualification that it has over any other pit is it is nearly a spec material in its natural state. It is a good blend of the different grades of aggregate and sand required to build a good road * * *. They would meet specifications [for both aggregate base course and mineral aggregate] right down the line, but it would take much less to get them to meet the [higher interstate highway] specifications than any pit I know of, moneywise [Tr. 221].

Felix said that the Summit pit had so much fine material mixed with oversize rock that the making of specification material would require a crushing operation that would yield 60 percent waste and only 40 percent usable aggregate, and the material used would require an additive to combat the stripping. As to the Fisher pit, Felix confirmed that the material has to be drilled, blasted, crushed, washed, sorted and blended to make acceptable ABC or MA. Of all the material sources he has examined and tested in the Flagstaff area, he knows of no other that has ABC, MA and sealcoating chips in a natural state, as exists on the Oleary claims (Tr. 227). He testified that the O'Leary deposit has the special quality of providing specification grade material at a cost which is "much cheaper than any other pit I know of" (Tr. 241). He attributes the reduced cost to the fact that:

> All the gradation needed is lying in one state. That is, it does not have to be blended. It would not require crushing, just screening. The aggregate in the pit already has naturally broken faces, which are required in specification material * * * a common variety of sand and gravel has been tumbled in a river and is round and requires crushing to get those broken faces [Tr. 241-2].

Felix further testified that the waste from the Robinson Crater pit (Oleary claims) would be minimal, and he estimated that in producing MA and ABC material the waste factor would amount to only about 5 percent, as compared to a waste factor of from 50 percent to more than 60 percent at the Summit pit (tr. 242).

Donald Reed testified for the contestees. He is a retired Bureau of Land Management mineral examiner and a mining engineer. His background includes several years road building experience in the employ of state, county and city governments. He once operated his own mineral aggregate business, including two crushing and screening plants.

Reed reiterated previous testimony to the effect that while mineral aggregate is quite plentiful in southern Arizona, it is very scarce in northern Arizona, particularly in Coconino County.

He confirmed that the material on the O'Leary claims is naturally crushed and segregated and stated that he had never seen another pit where natural material could be taken from the pit and used for sealcoating without first crushing and processing it (Tr. 276). He noted especially that the sealcoating chips are not mixed in with the mineral aggregate but have been naturally segregated (Tr. 287).

Carl M. Shearer testified for the contestees. Shearer is a civil engineer and part owner of Arizona Grading and Paving Company, which he serves as engineer and estimator. He was employed for 7 years as an engineer with the Arizona Highway Department, and for more than 6 years as a construction engineer with the Department of Agriculture in Arizona, New Mexico, Colorado and Utah. He was employed by Arizona Sand and Rock Company, then formed his own corporation engaged in crushing, screening and placement of aggregates, primarily in asphalt. Subsequently he spent 7 years as vice president of Bentson Union Rock Co., Phoenix, all in materials, pavement and placement of aggregates. He then formed another company, Shearer Paving Company, which built roads, streets and highways, operating state-wide in Arizona.

Shearer testified that his present company used the subject deposit as their only source of material for 6 months during 1963. Arizona Grading and Paving Co. had an $ 83,000 standard asphalt plant 5 miles east of Flagstaff. It installed a screening unit on the claims and spent $ 20,000 on the improvement of the access road under a Forest Service special use permit. During the time they used this material they did about $ 170,000 in gross business from all sources, including the 700-foot extension of the Flagstaff Municipal Airport, in which this material was used entirely.

Shearer testified to his familiarity with most of the aggregate pits in the Flagstaff area, and he estimated that about 90 percent were cinder pits and the balance in limestone formations. He, too, compared Robinson Crater pit with the limestone quarry operations at the Fisher pit on the opposite side of Highway 89, about one-half mile away. He repeated that the Fisher pit is a quarry which must be drilled and shot. Then the rock "has to be put through a number one primary plant crusher, moved into a secondary crushing and screening plant, and then it becomes a usable product, a very expensive process" (Tr. 320).

He testified that by purchasing from the Oleary claims his company had an almost unlimited supply of pit run native material which required only that "we put it through a fast screening plant, a very inexpensive operation, to eliminate any oversize-anything above one inch." Without any further processing, he said, the material met the specifications of the Civil Aeronautics Administration and the specifications of the City of Flagstaff for asphalt. Screening to 1 inch, the waste factor was 20 percent (Tr. 335).

Shearer testified that, given the opportunity, he would not hesitate to sign an advance-payment 10-year lease on the claims, or even two or three of them, right now (Tr. 360). He emphatically expressed the belief that he would be better off competitively with the Robinson Crater pit than with any other pit in the area (Tr. 363).

Shearer testified to advantages not discussed by previous witnesses.

> * * * For one thing, you can sell this material commercially if you wanted to hustle in a basic surfacing without even touching it, pit run as is, loaded in the truck, dumped on your property, and spread with a blade or by hand. That is one item. I know of nothing else except cinders in vast amounts here that you could do the same thing with. * * * You can also lay this material screened or crushed and meet highway standard specs for field mix or road mix, not in an asphalt plant. Most everyone has seen long windrows of material not down flat and the admission of liquid asphalt and then mixed with motor graders [Tr. 323].
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> * * * * * * *
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> Q. I think there were some antistripping agents that --
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> A. Yes, antistripping agents, mineral filler, lime, numerous ones, No Strip, there's a dozen products in the United States and they are costly and certainly in my experience 25 percent efficient as compared to their ads. They retard it some, but not much.
>
> Q. But when you have an aggregate like the Robinson Crater pit that doesn't strip, then you've got quite an advantage, is that right?
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> A. Very clearly. It is very clean. Another use that we demonstrated of this material, the State Highway and the city, counties, all asphalt people seal with what is known as a chip or basically crushed stone three-eighths inch. It will go through a three-eighths screen. The State Highway Department has what is known as on federal aid projects very tough specifications known as type D. It requires three sides fractured by crushing. We screened three-eights chips native as is in the Robinson Crater pit and used it and sold it to the state without crushing, which certainly there were two to four native fracture bases on it never requiring crushing.

> Q. How about its weight in comparison to other pits or other aggregates, normal sand and gravel, perhaps?
>
> A. Well, as compared to the pit on the, I guess you would say the west side of Highway 89 in the Fisher area, that quarry pit, it is considerably lighter than that, certainly by possibly 15 or 20 percent, and compared to the Salt River material down through the Salt River Valley and Phoenix, about the same. It doesn't have the high tensile strength and the high rattler test known as the LA rattler of the Salt River material or this material out here, but it does pass, it has not been rejected strengthwise, and the coverage of this Robinson Crater material, the best way to give it to you is if you are in the business to make a living in this as I am, a ton of Salt River aggregates in the same size aggregates as Robinson Crater will cover ten square yards of surface area two inches thick of commercial pavement; the Robinson Crater material is lighter, it will cover practically 12 square yards. You gain two square yards, which in Phoenix is a gain of about $ 4 in a finished product and here about $ 6. I would like to own this pit right now I'll promise you [Tr. 325-6].

Testifying on the basis of an admittedly uncertain memory, Shearer recalled that he had paid 25 or 30 cents per cubic yard for material form the claims. Statewide, he said, the average is 10 cents a cubic yard (Tr. 329-30).

Moreover, with the size of their investment and their contractual commitments in the area at the time, Shearer said they would have paid double the amount to McCormick (Tr. 330).

He testified that his haul distance from the Robinson Crater pit to Flagstaff was 19 miles, after which "we were subjected to a long, hard uphill pull with loaded equipment, and it certainly increased our haul another five miles at least, or six. It was still worth it" (Tr. 334).

Shearer stated that at that time crushing costs were a minimum of 80 cents per ton and ranged upward. He calculated screening costs as being roughly one-third the crushing cost (Tr. 335).

He testified that he had used seal chip material from the pit near Mormon Lake, "a rugged and expensive pit, a losing venture." There was 12 feet of overburden and a high waste factor (Tr. 345). His company paid 10 or 15 cents royalty for that material. They are presently leasing a deposit of tufa from the State of Arizona. The pit is located "right here in east Flagstaff," and they pay "either 14 or 18 cents a cubic yard to the State Land Department."

He says, "It is the finest deposit of tufa in northern Arizona, and we use it regularly" (Tr. 346). However, this material cannot be used in an asphalt plant because it has insufficient strength (Tr. 355).

Shearer's company has also purchased material from the Fisher pit, but it was bought loaded into their trucks and not on a royalty basis.

Shearer said that although his business is basically asphalt, he had done considerable concrete work, and he had used the aggregate from the Robinson Crater pit to construct "machinery mounts, heavy equipment, massive machinery, concrete mounts * * * and in the approaches to the truck scales" (Tr. 352).

Asked if the naturally crushed aggregate on the O'Leary claims was, in his opinion, a common variety of sand, rock, gravel or stone, Shearer answered, at Tr. 357:

> A. Well, it is clearly uncommon for one or two or maybe even three reasons I gave, economically, businesswise, and it is -- well, it is just a rare and acceptable product for the various uses that are in the record that I gave.
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> * * * * * * *
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> BY HEARING EXAMINER LUOMA:
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> Q. Mr. Shearer, is it so uncommon that that is the only place that you know of where it occurs in this area?
>
> A. Well, I can certainly say yes to that. Yes, sir.

Still responding to questions by Judge Luoma, Shearer provided the following, at Tr. 360.

> Q. What about the chips? How much of the chips are there in a naturally occurring form?
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> A. Well, over a set of powered screens that we had, we were producing and loading about 70 tons per operating hour. In a normal crushing operation with a crushing and screening plant combined to get a three-eights stone down to that size and reject all else is about 30 tons per hour.
>
> Q. Well, I don't believe you were here, but I believe there was testimony given that the chips occurred naturally separate from the other aggregate?

A. There is a natural recovery, a real good recovery, better than any pit I have ever seen.

Q. Would you known how much of that material is there?

A. Well, that's a little bit hard, but of the, say, 70 tons an hour that went through out plant, certainly we were getting free material, that's what we call it, free, 15 or 20 percent of that 70 per hour.

Q. During your entire operation?

A. Any hour over that particular plant.

Gerald R. Vossenkemper, a civil engineer employed by the Forest Service, was called as a witness by the contestant. Vossenkemper had been employed by the Forest Service for the preceding 10 years, building roads and buildings. He had been in the Coconino National Forest, with headquarters at Flagstaff, since 1965.

He described several of the material sources in the area and the materials they produced. He stated he was familiar with the material on the contested claims and acknowledged that it is usable, but stated that it has a high absorption rate and a high wear ratio. However, he also testified that all of the sources of material which he knew about within a 50-mile radius were quarry operations in which the material required crushing, except for the Robinson Crater pit on the contested claims, which he said could be used pit run, but would not necessarily meet specifications (Tr. 387).

Vossenkemper also testified that a crushing operation with no quality control would run approximately 87 cents per ton (Tr. 387).

George H. Bell testified as a witness for the contestees. Bell is a graduate civil engineer, a contractor, and owner of a company which manufactures construction materials. The materials company manufactures aggregate for use in paving and the contracting company does paving jobs primarily. Bell has 17 years in the aggregates industry.

Bell confirmed that in the Flagstaff area and throughout northern Arizona aggregate materials are very scarce (Tr. 398), and of poorer quality (Tr. 399). He has used materials from the McCormick pits, but was advised by a letter from the Forest Service to discontinue his use because it was illegal (Exh. 34, Tr. 400). He was subsequently threatened with his own arrest and that of his employees if they passed the barricade which the Forest Service had erected on the access road to the claims (Tr. 401). At the time, Bell was producing 300 tons of aggregate per day from the McCormick pits (tr. 402). He paid McCormick 36 cents a ton.

Bell paid the Forest Service 20 cents per ton to produce from the Summit pit. He knows that Fisher Contracting is charging 25 cents from the pit on its claim. Bell pays the Navajo Indians 10 cents for the produce of a pit on the reservation near Grand Falls, the low price in that instance being attributable to the long haul from there. In the Salt River Valley Bell purchased aggregate for 10 cents a ton, and he has information that it is still available at that price. Bell testified at Tr. 405:

> Q. The prices that you have quoted, the price for the materials from the McCormick pit is higher than any of the other prices. To what do you attribute the greater price that you must pay for the materials from the McCormick pit?
>
> A. The reason I am willing to pay a larger price for the material from the McCormick pit is because of the specific use that I have for it. In comparison to the other materials in the immediate locale, through testing from Sergent, Hauskins & Beckwith, soil engineers in Flagstaff, I have found that the McCormick pit is superior to any other material that I have been able to locate in that local [sic]. The Los Angeles Rattler test, in the stripping test, in retained stability and the immersion test, it has less absorption, which is more advantageous, and the material, by its own nature, is an easy material to produce. We have in our requirements for manufacturing asphaltic concrete and chips for cover material a fractured face requirement on material retained on a No. 4 sieve. And the material from Mr. McCormick's it is in a semi-crushed state where it has been deposited, it has evidently been slid into that location, and in the sliding has been fractured or crushed, so that almost any particle that you find that is retained on a No. 4 sieve has a fractured face on it without going through a crushing plant, and are counted that way by the State Highway Department, to my own knowledge. And because of these qualities, I am certainly willing to pay a little more royalty for the material.

Unlike the other users (Kennedy, Felix and Shearer), Bell runs the material through his crusher "to control the gradation necessary to meet most specifications." However, he expressed the opinion that by simply screening out the oversized material, "you could get a material that might be called a crushed material" without having to crush it (Tr. 405).

Again with reference to the special and distinct physical qualities of the deposit on the Oleary claims, Bell testified at Tr. 407-8:

Q. Are there any other special features or qualities of this material that makes it more valuable to you, or to other people using it?

A. Well, the one other thing that I was about to mention is that -- and I hadn't gotten off of the fractured-face requirement yet, maybe I am just a little slow -- is that the advantage is that to get this quality in any other material, you would have to run a quarry-type operation, you would have to drill and shoot the material. This material is an easily minable material for our purposes, it has very little overburden on it, and it can be loaded right out of the bank into a truck to haul to the crusher.

HEARING EXAMINER LUOMA: You mean you don't drill or blast at all in this operation?

THE WITNESS: No, sir.

* * * * * * *

HEARING EXAMINER LUOMA: Let me finish up on that point. Does that mean that the other sources that are available to the Flagstaff area must be drilled and blasted?

A. The only other one that I know of in this immediate area is either drilled and shot or ripped with a big heavy rip Cat. This would be exclusive of volcanic cinders.

Bell went on to describe the various engineering tests for absorption, wear, asphalt retention, etc., to which the material had been subjected in laboratory analysis, with satisfactory results. He stated at Tr. 408-9:

* * * I believe I mentioned in the first part that this was one of the reasons that I preferred the McCormick pit, was that it does meet the stripping requirements even for the FAA. It was the only source of material that I could find in Northern Arizona that would meet your requirements for the FAA when I did the last overlay on the Flagstaff airport.

Q. Is it your testimony that they can't use any other material up there for the airport, then?

A. No, I didn't say that. The other materials could be used by adding an anti-stripping agent or by

> the adding of a mineral filler, such as lime, which reduces the stripping characteristics of many different aggregates.
>
> * * * * * * *
>
> Q. If today you had need for this mineral aggregate and you could get it from the Indian pit at 10 cents a ton and you could get it from the Fisher-Bleak pit at 25 cents a tone and from the McCormick pit at 36 cents a ton, which one would you go, where would you go to get your needs taken care of?
>
> A. I would go to the McCormick pit. That is where I have been going.
>
> Q. You would prefer to pay the 36 cents rather than 25 cents to Fisher-Bleak?
>
> A. Yes, I sure would. * * *

And, on cross-examination, at Tr. 439:

> Q. Mr. Bell, you say you would prefer to pay the higher price. Would you, as briefly as you can, in case you have already covered this thoroughly, say why?
>
> A. Well, for one reason is that I wouldn't have to drill and shoot or rip. That would more than offset the 16 cents difference, or 6 -- 11 cents difference in royalty right quick.

James C. Latham was called as a witness for the contestant. Latham is employed by the Arizona Highway Department as Assistant Engineer, Materials. He has 16 years experience in road building. He is a registered civil engineer.

Latham testified that his tests show that the subject material meets specifications for ABC and MA but that it is not of the highest quality in every respect. However, it does meet the State Highway Department's specifications for the Flagstaff area, based on climate and conditions, and the material available (Tr. 493).

He stated that hauling costs are estimated at 7 cents per ton, and contractors' charges for crushing run from $ 1.25 to $ 2.00, depending upon the job and the bidding.

Latham further testified that by regulation promulgated pursuant to a State statute, the Highway Department is limited to the

following maximum prices which it can pay for materials: 3 cents/ton for barrow (fill), 6 cents/ton for selected material, 8 cents/ton for mineral aggregate, and 10 cents/ton for cover material (Tr. 497-8).

Latham stated that the Navajo Indian pit at Grand Falls yields material that does not have as good retention of asphalt as the material from the McCormick property and because of this "we have to go to a very expensive lime treatment on the Grand Falls material" (Tr. 498).

As to the availability, Latham said, "I wouldn't say there was ever sufficient material in the Flagstaff area" (Tr. 498); and repeated that good aggregate is "very scarce" (Tr. 506).

He indicated that if the Highway Department had to pay 36 cents for material from the contested claims they would not use it, presumably because of the Department's special restrictions on costs. But, hypothetically, Latham testified that in choosing a source of supply he would be influenced in deciding whether to pay McCormick 36 cents per ton by such considerations as the hauling distance, design, and other cost factors, saying, "It is all compared, you have to take your comparative costs, the blasting and ripping against the other costs" (Tr. 512).

This concludes the principal summation of the evidence.

[1] We conclude the merits of the case demand a holding that the material is locatable. The evidence establishes the following special characteristics of the deposit which translate directly into special and substantial economic values:

1. No drilling, blasting or ripping is required.

2. No "primary" crushing (to reduce the rock to minus 15 inches) is required.

3. Three of the four purchasers testified that no "secondary" crushing was required.

4. There is little or no overburden.

5. The material is naturally sorted by type, no sorting or classification is required beyond screening to eliminate oversize.

6. The waste factor is very much lower than at other area pits.

7. The material is naturally clean, requiring no washing.

8. No blending of fine or coarse aggregates is necessary to meet specifications.

9. Because the material is significantly lighter in weight than competing aggregates, a ton of the subject material will cover a 20 percent greater area.

10. The material can be used without the addition of expensive lime or commercial anti-stripping agents.

No other deposit described in the testimony had all of these attributes. All of the witnesses who were actually engaged in the asphalt paving business testified that they were willing to pay more for this material because of these special economic advantages except for Latham, who was barred from paying more than 10 cents a ton by highway department regulations. Even so, Latham inferred, hypothetically, that he might purchase the material at 36 cents if the economic advantages warranted.

In United States v. U.S. Minerals Development Corporation, 75 I.D. 127 (1968), the test imposed by this Department was whether the material which is used for the same purpose as common varieties of materials are used could, by reason of its special and distinct properties, command a higher price in the market place.

Although at the hearing all concerned were wont to refer to the money paid to McCormick as "royalty," we are of the opinion that when contractors come to a pit to buy materials the pit is the "market place," the purchasing contractors comprise the "market" to which the material is sold, and thus the money paid to the pit owner can as easily be called the "purchase price" or the "market price" as it can be called the "royalty." Ordinarily, in this context a "royalty" refers to the payment made to the owner of the mineral by one who is vested with a leasehold interest of that mineral. But in a situation such as this, where the pit is opened, the overburden has been removed, the material is lying there naturally crushed and sorted and ready to be loaded, the distinction between "royalty" and "market price" becomes inconsequential. It might depend on whether the purchaser or McCormick removed the thin mantle of overburden and exposed the material (McCormick did much of this), or upon whether McCormick sold material from the pit to all comers or leased it on an exclusive basis to a single company or individual. In our view it is irrelevant whether the 36 cents a ton paid to McCormick is dubbed the "price" or the "royalty," and we regard the distinction drawn in the dissenting opinion as artificial. Therefore, we hold that the test postulated in United States v. U.S. Minerals Development Corp., supra, has been met.

[2] Moreover, the deposit meets the alternative test laid down by the Court of Appeals for the Ninth Circuit in McClarty v. Secretary of the Interior, 408 F.2d 907, 908 (1969), which held that the special economic advantage of a deposit may be reflected by reduced costs or overhead so that the profit to the producer would be substantially more even where the price remained competitive with other materials used for the same purpose.

Clearly, the special and distinct physical properties of the subject deposits are such that there is a substantial economic advantage to the producer resulting from reduced costs of production. Regardless of whether McCormick reaps this economic advantage as the "producer" or is paid a higher unit purchase price by the producer in consequence thereof, it all comes down to the same thing: the claimants derive substantially more money per unit from this deposit.

This Board has held in United States v. McClarty, 17 IBLA 20, 81 I.D. 472 (1974), and in United States v. Pope, 25 IBLA 199 (1976), that where the material in question was naturally fractured so as to preclude the necessity for drilling, blasting and other quarry work, requiring only a minimum of effort to produce and prepare if for use, the economic advantage thereby gained over other deposits was sufficient to classify the deposit as locatable. That is precisely the operative criterion in this instance as well.

The dissenting opinion finds that "the higher royalty of 5 to 16 cents person, while yielding a higher profit, does not constitute so substantial a higher profit as to remove this deposit from the category of a common variety of sand and gravel." We disagree.

First, the premium spread is 5 to 26 cents. Material from both the Grand Falls pit and the Salt River Valley sells for only 10 cents per ton. Likewise, Shearer testified that the average statewide price for aggregate is 10 cents. The Highway Department is limited to a maximum payment of 10 cents.

As noted in the dissenting opinion, in the McClarty case, supra, the stone could be produced at one-half to one-fourth the cost of his competitors. In this case we find that McCormick receives more than 3-1/2 times as much as materials selling for 10 cents; 80 percent more than materials selling for 20 cents; 44 percent more than materials selling for 25 cents; and 20 percent more than material selling for 30 cents. Although in this case we are dealing with a premium price calculated in cents per ton rather than in dollars per ton as in Pope and McClarty, we should also consider that McCormick sells a vast volume and has ample supply to continue to do so for many years hence. It will be recalled that Shearer was taking 70 tons per hour, Bell was taking 300 tons per day, and McCormick's projected sales over the next 20 years are 800,000 tons.

There is no basis on which to conclude that the locators' profit would not be "substantially" greater.

Of course we agree with the dissent to the extent that:

(a) the fact that a deposit of sand and gravel can be marketed at a profit does not establish it as an uncommon variety;

(b) the fact that a particular kind of material may be better suited for a specific purpose for which common varieties may be used, and command a higher price for that reason, does not make the material an uncommon variety where its superior characteristics are not unique or rare;

(c) the fact that a deposit of a common variety mineral material may enjoy an economic advantage due to its closer proximity to the market does not, of itself, make the material any less common.

See, e.g., United States v. Guzman, 18 IBLA 109, 81 I.D. 685 (1974).

Each of the foregoing propositions is concerned with deposits which are widespread and abundant and which have no other distinguishing properties which would given them a special and distinct value. However, where, as in the McClarty case, the deposit does have some uncommon or unique characteristic, the above propositions of law will not operate to exclude such a deposit from location under the mining law. At that point the sole consideration is whether the special and distinct properties of the deposit afford it a distinct and special economic value which make it "commercially valuable for use in a manufacturing, industrial or processing operation," and such value for such use substantially exceeds the value "of the general run of such deposits." 43 CFR 3711-1(b).

Accordingly, we conclude that the material is not a common variety and that it is locatable under the mining law under the tests described in United States v. U.S. Minerals Development Corp., supra; United States v. McClarty, supra; and United States v. Pope, supra. Therefore, we affirm the decision of Chief Administrative Law Judge Luoma.

However, the author will add his own comments with reference to one aspect of that decision. Judge Luoma found the Lucky Four claim to be invalid on the premise that the material on that claim did not have the natural stratification and grading peculiar to the other claims. In this we agree. He also found that the four 10-acre subdivisions which comprise the northern half of the O'Leary No. III to be nonmineral in character because the aggregate occurs chiefly on the south half of that claim, thereby reducing the total area of the Oleary Nos. I, II, and the south half of III, to the 200 acres

which contains the heaviest deposit of the mineral aggregates. In this we also agree.

However, Judge Luoma then calculated that based upon the estimated volume of aggregate present on the remaining 200 acres only 120 acres would be required to supply the claimants' anticipated requirements over the next 30 years, the term of time arbitrarily utilized as the measure of a reasonable reserve supply in United States v. Anderson, 74 I.D. 292, 304 (1967). He then held that all acreage in excess of 120 acres "is deemed not marketable in the reasonably foreseeable future and therefore nonmineral in character under the ten-acre rule." (Emphasis added.) Judge Luoma then made provision for the selection by McCormick of the 120 acres to be retained and the 80 acres to be eliminated, as follows (Dec. 26):

> Contestee's future plans call for working downward in pit No. 4 and then westerly through the Oleary No. III claim. Also, he plans to work downward in pit No. 5 and then easterly, straddling the Oleary Nos. I and II (Tr. 549-551; Ex. 36). According to these plans, production would most likely occur in the remaining southern half of the Oleary No. III, the southern half of the Oleary No. II, and the northern half of the Oleary No. I, the total of which is 120 acres. However, the evidence does not establish that these parcels necessarily contain all 12 of the most valuable 10-acre subdivisions consistent with Contestee's operations. Therefore, other 10-acre tracts within the claims may be selected in lieu of those named so long as the total does not exceed 120 acres and the overall configuration remains in reasonably compact form.

This was error. It was done on the theory that an excess of the mineral in the claim over the foreseeable market requirements compels a conclusion that the lands containing such excess of mineral are nonmineral in character. It is tantamount to saying that a locator (or an association of locators) must find mineral within the limits of the claim in sufficient amounts to constitute a discovery, but that he must not locate a claim that contains too much of that mineral because an overabundance will result in the loss of portions of the claim, since too much mineral is the legal equivalent of no mineral at all for the purpose of determining the mineral character of public land. This is incorrect. This Board addressed itself to this precise issue in United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972), wherein we held that a single discovery of a valuable mineral deposit is sufficient to validate an association placer mining claim, and each 10-acre subdivision within the claim is properly determined to be mineral in character where the mineral material present is of a homogenous nature throughout the entire claim. The fact that a claim in its entirety may contain more of the mineral than the market can be expected to absorb in the reasonably foreseeable future is not a basis for a determination

that selected subdivisions within the claim are invalid because they are not mineral in character.

The rule which requires the exclusion from a claim of any 10-acre subdivision which is nonmineral in character is entirely different and distinct from the rule regarding the location of multiple claims containing deposits far in excess of any reasonably anticipated market need, in which case the entire excess claims may be held null and void. United States v. Baker, 23 IBLA 319 (1976); United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972); United States v. Anderson, supra; cf. United States v. McCall, supra.

Since in this case it has been demonstrated that the produce of all three Oleary claims will be reasonably required to supply the anticipated market over the next 30 years, all three claims should have been held to be valid to the extent that they are mineral in character. 1/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

1/ The contestees did not appeal from this decision. Acting in accordance therewith on December 20, 1971, they filed with the Bureau of Land Management a relinquishment of all rights to the Lucky Four claim and portions of the Oleary Nos. I, II, and III. Although neither of my colleagues on the panel agree, it is my view that the filing of the appeal by the Forest Service stayed the effect of Judge Luoma's decision and the need for compliance therewith during the pendency of the appeal, and that this Board, having authority to review the case de novo, can and should correct any error which it detects in the decision below. Chief Judge Frishberg believes that once the subject 80 acres were relinquished, for whatever reason, those parts of the claims no longer existed, as a relinquishment is operative eo instanti when filed, so that there was nothing left which could be considered the subject of an appeal. Accordingly, he regards the issue as moot, and he does not subscribe to this portion of the discussion. Judge Ritvo's view is set out in his separate opinion.

ADMINISTRATIVE JUDGE RITVO DISSENTING:

I would affirm the decision below except insofar as it held claims valid in part, reverse to that extent and hold the claims invalid in toto. I would find that the deposit is not an uncommon variety within the meaning of the Act of July 23, 1955, 30 U.S.C. § 611 (1970).

In reviewing the requirements for establishing whether a mineral deposit is an uncommon variety under the Act of July 23, 1955, the Board had the following to say in United States v. Guzman, 18 IBLA 109, 120, 81 I.D. 685, 690 (1974):

> The various tests developed by the Secretary of the Interior to determine whether a particular deposit is an uncommon variety of sand, gravel, or building stone have been summarized by the Court of Appeals for the Ninth Circuit: (1) there must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special economic value may be reflected by the higher price when the material commands in the market place, or by reduced cost or overhead so that the profit to the producer would be substantially more. McClarty v. Secretary of the Interior, 408 F.2d 907, 908 (9th Cir. 1969).

In addition to the above criteria for determining whether a mineral deposit is an uncommon variety, the claimant must also establish that the normal test for the validity of each mining claim has been met. In order for a mining claim to be valid there must be discovered within the limits of the claim a valuable mineral deposit. 30 U.S.C. § 21 et seq. (1970). A discovery exists,

> * * * [w]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Castle v. Womble, 19 L.D. 455, 457 (1894). This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and presently marketed at a profit, the so-called marketability test. United States v. Coleman,

390 U.S. 599, 602 (1968); United States v. Guzman, supra 21 IBLA at 120-121, 81 I.D. at 690.

However, the fact that a deposit of sand and gravel or stone can be marketed at a profit does not establish it as an uncommon variety. The Act of July 23, 1955, removed from the category of locatable mineral common varieties of deposits of sand and gravel and stone and other materials regardless of whether their extraction would yield an economic return. United States v. Underwood, 22 IBLA 62 (1975). Suit for judicial review pending, Underwood v. Secretary of the Interior, Civ. No. 5-76-91 (E.D. California).

There is no dispute in the record regarding appellee's ability to satisfy the prudent man-marketability test. Therefore, the main issue before the Board is whether appellee proved by a preponderance of the evidence that the subject deposit possesses unique properties giving it a special and distinct value, thereby making it locatable under the Act of July 23, 1955.

With these legal guidelines in mind, I now turn to a review of the relevant evidence.

Much of the evidence presented at the hearing was directed to the question of whether or not the mineral aggregate on appellee's claims was an uncommon variety. Robert E. Wilson was called as an expert witness on behalf of the contestant (Tr. 12). Wilson is a mining engineer employed by the Forest Service and is well qualified by education and experience to examine and determine the validity of mining claims. Wilson testified that the material from the claims had been mined and removed for use as a mineral aggregate (Tr. 19, 36, 539); there was very little overburden on the claims (Tr. 21); the material was naturally crushed (Tr. 35-36); and was removable by simply placing excavation equipment on the site and loading the material onto trucks (Tr. 21). When asked his opinion on whether a discovery of a locatable mineral had occurred which would justify a prudent man in developing the claims, Wilson responded that he did not believe that there was sufficient evidence to establish the existence of a "locatable" mineral, however, if the mineral aggregate in question was considered to be an uncommon variety, a person would be prudent in developing the claims (Tr. 52, 542). Wilson concluded that the mineral aggregate was a "common variety" because other material of widespread occurrence could be used for the same purpose, and the particular deposit had no unique use over and above normal uses for mineral aggregate (Tr. 37, 53). Wilson went on to describe other quarries in the Flagstaff area which supplied mineral aggregates (Tr. 74-75).

Thereafter, the following witnesses testified on behalf of the contestee: Arthur Kennedy, retired, former director of the City of Flagstaff's Public Works Department for six years, and before that,

Flagstaff street superintendent for 29 years in charge of paving and work on the city streets; James D. Felix, a road construction contractor in Flagstaff, formerly a State Highway Department road material superintendent between 1957-1967; Donald F. Reed, a mining engineer and retired BLM mineral examiner; Cale M. Shearer, a civil engineer employed by the Arizona Grading & Paving Company, Flagstaff, formerly an employee of the State Highway Department where he was in charge of supervising contractors who processed and placed paving materials; and George H. Bell, a civil engineer who is a contractor for and manufacturer of highway construction materials in Flagstaff. In addition, the appellee, Melvin McCormick, and his wife, Hilde McCormick, testified at the hearing.

Most of the testimony related to the market area for supply and demand in the immediate Flagstaff area. Shearer testified that the market encompasses an area within a 40-mile radius of the city (Tr. 359), and Felix stated that he had examined aggregate material within a 55-mile radius of Flagstaff (Tr. 320). The market area is restricted to a reasonable distance due to truck haul cost considerations (Tr. 433). Kennedy, Felix, Reed, Bell testified that there is a scarcity of quality mineral aggregate in Northern Arizona, particularly in Coconino County (Tr. 82, 216, 263, 398, 428), and Kennedy, Reed and Bell testified that prior to 1962, when local pits were discovered, sand and gravel had to be shipped into the area from Phoenix (Tr. 82-83, 90, 93, 263, 433).

The various witnesses testified that the subject deposit was put to use for ordinary purposes, namely, as mineral aggregate in the manufacture of asphaltic concrete, and as sealcoating on asphalt pavement. Evidence was presented describing alternate sources of mineral aggregate and sealcoat chips: cinders (Tr. 82, 90, 215, 320, 346, 428, 501); sand and gravel (Phoenix -- Tr. 82-83, 90, 97, 205, 263, 433; Grand Falls Indian Reservation -- Tr. 404, 438, 442-44, 497-98); malapai rock (Tr. 83, 192, 217); Kaibab limestone (Tr. 75, 83, 217, 368, 494, 506); volcanic rock (Fisher pit -- Tr. 75, 84, 155-56, 206, 227, 320, 348, 404, 411, 414); volcanic sand (Summit pit -- Tr. 159, 226, 235, 404, 420); basalt (fairgrounds area -- Tr. 75, 167, 217, 367, 437, 494, 502, 506); and tufa (East Flagstaff area -- Tr. 321, 346, 355).

Contestee's witnesses testified that the subject deposit has the following unique properties:

(1) It is found in a naturally crushed state with little or no overburden (Tr. 35-36, 154, 172, 406-07);

(2) removal only requires excavation and screening; there is no additional processing required such as drilling, blasting and crushing (Tr. 87, 155, 158, 241, 320, 406, 425);

(3) the material, in its natural state, is an excellent quality for asphalt and sealcoat and meets Flagstaff City, State Highway Department and Federal Aviation Administration specifications for quality road material (Tr. 220-22, 241, 280, 322, 325, 335, 408-09, 493, 496, 499, 510);

(4) very little material is wasted during processing (Tr. 158, 226, 242, 325);

(5) the material is lighter than its competitors permitting greater ground coverage (Tr. 326, 433); and

(6) the material does not strip when subjected to harsh weather and heavy use (Tr. 86, 156, 242, 324, 406).

Chief Judge Luoma summarized the comparative economic advantage of appellee's deposit as follows:

> * * * There are a few other deposits of stone on the Flagstaff area, in addition to Contestee's, which can produce generally satisfactory mineral aggregates. All of these others, except for a deposit at Grand Falls, require drilling, blasting and crushing. To perform these operations costs in the neighborhood of $ 1.50 per ton (Tr. 235-236, 349, 387, 495). In addition, the product obtained from all sources except Contestee's must be treated with an anti-stripping agent which is very expensive and not completely efficient (Tr. 242, 325, 409). While the Grand Falls deposit doesn't require drilling and blasting (Tr. 422) it is located 20 miles farther from Flagstaff than is Contestee's (Tr. 404) which adds $ 1.20 per ton to the cost (Tr. 440). Also, the Grand Falls deposit requires an expensive lime treatment for anti-stripping (Tr 324, 498). There is a great abundance of volcanic cinders which has been used in the past for aggregate purposes, but experience has proved that they are totally unacceptable (Tr. 82, 215, 434-435, 501).
>
> Statewide in Arizona the average royalty paid for concrete aggregate without processing is 10 cents per yard. [Footnote omitted.] In the Salt River Valley near Phoenix, the average royalty is 10 cents per ton. In the Flagstaff area the prices range from 10 cents per ton at the Grand Falls pit to 25 cents at the Fisher pit. The Fisher pit is located within one-half mile of Contestee's claims. The material from Contestee's claims, and it alone, commands the higher price of 36 cents per ton (Tr, 89-92, 114, 153-155, 161, 164, 329-330, 346, 404-405; Exs. 24, 37) * * *.

* * * * * * *

> Mr. Bell testified * * * that if given the choice of obtaining mineral aggregate materials from the [**56] Grand Falls pit at 10 cents per ton, from the Fisher pit at 25 cents per ton and the Contestee's pit at 36 cents per ton, he would choose Contestee's material for the reasons he stated (Tr. 438-439).
>
> The evidence presented clearly supports the conclusion that Contestee's deposit of mineral aggregate is unique in the Flagstaff market area, and by virtue of this brings to the producer at the pit a price that is higher than that received by competing producers. Squarely in line with the rule announced by the Ninth Circuit Court in the McClarty, case, supra, it is concluded that the deposit contains an uncommon variety of stone within the purview of the 1955 act [Dec. at 21-22, 24].

Other evidence was given by the Government Gerald R. Vossenkemper, a forest engineer for the Forest Service, and James C. C. Latham, an assistant engineer, materials, for the State Highway Department, who was Felix' immediate supervisor at the time that the subject claims were examined by the Highway Department.

Vossenkemper testified that the State was obtaining road building material for an interstate highway from a basalt pit southwest of Flagstaff, which had a high wearing quality, low absorption rate, and was highly suited for asphalt concrete (Tr. 367). The McCormick material, he said, was usable in asphaltic concrete, but it had a high absorption rate which required more asphalt content, and had a high wearing ratio, which would cause it to wear down faster than basalt (Tr. 372). He would use the McCormick material for surfaces not subjected to heavy traffic loads (Tr. 372). Finally he stated, that in deciding which pit to use for a job, all factors had to be balanced -- quality, cost of quarrying and crushing, if any, hauling or maintenance to determine which pit would be the most economical source (Tr. 373, 385-386).

Latham agreed that the material from McCormick's pit was within the Highway Department's specifications, but said it was not the best (Tr. 491); that its resistance to abrasion was marginal (Tr. 492). He stated that the Highway Department had used material from the Bleak-Fisher pit, which made basically the same material as McCormick (Tr. 494).

Latham also stated that the State Highway Department was using basalt from the pit near the fairgrounds near Flagstaff and would

be using basalt on another project (Tr. 494). These sites were most economical for the jobs, considering the fact that haulage costs are 7 cents a tonmile and that the costs saved in not having to crush McCormick's material would have to be weighed against the haulage costs (Tr. 495). He also said that any material, including McCormick's, going into asphaltic concrete or aggregate base requires crushing since it has to be graded (Tr. 497). Primary crushing applies to any material passing a 15-inch grizzly while secondary crushing involves 8 inches or less (Tr. 497). The Grand Falls material, he said, was usable and better in some respects and had been used, but required an expensive lime treatment to bring its retention up to specifications (Tr. 498). McCormick's seal chips were barely within specifications for abrasion loss (Tr. 495). He stressed that basalt was in general better than rhyolite (Tr. 501). On cross-examination he stated that the State had never used McCormick's material, but has used the Bleak Pit (Tr. 504-505). He emphasized that the State bases its estimate upon the source closest to the job which will meet specifications, but the contractor can get his material anywhere he wants so long as it meets specifications (Tr. 505). He agreed that the McCormick materials met the specifications (Tr. 505).

In response to a question from the Hearing Examiner, he said that the "basalt" pit was on United States Forest Service land and was available to the State royalty free.

The characteristics attributed to the deposit would not of themselves be sufficient to bring it within the definition of a common variety. In United States v. Guzman, supra, the Board stated:

> Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. For example, many kinds of common rock may be used to build a wall and, because their physical properties differ, certain kinds of common rock may be preferred for this purpose and, in fact, make a better wall and command a better price. Nevertheless, they remain common varieties of rock because their physical properties are not unique or rare. United States v. Ligier, A-29011 (October 8, 1962); United States v. Shannon, 70 I.D. 136 (1963). This Board held similarly with reference to a deposit of cinders in United States v. Harenberg, 9 IBLA 77 (1973), stating:
>
> > A deposit of volcanic cinders which are suitable for use in the manufacture of cement blocks must be regarded as a common variety mineral material within the context of the

> Act of July 23, 1955, when the evidence shows that other such deposits occur commonly in the area and are similarly used, and the fact that the subject deposit has qualities which are particularly well-suited to this purpose does not alter its essential character as common cement block material.
>
> Likewise, the Department has consistently held that [a deposit] of sand and gravel suitable for all construction purposes, which may be superior to other deposits of sand and gravel found in the area because it is free of deleterious substances, and because of hardness, soundness, stability, favorable gradation, nonreactivity and nonhydrophilic qualities, but which is used only for the same purposes as other widely available, but less desirable deposits of sand and gravel [is], nonetheless, a common variety of sand and gravel. United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968); United States v. Ramstad, A-30351 (September 24, 1965); United States v. Basich, A-30017 (September 23, 1964); United States v. Hensler, A-29973 (May 14, 1964); United States v. Henderson, supra.
>
> The angularity of this sand and gravel is attributed to the fact that it has not been carried as far from its source by the action of the stream and, accordingly, it has been subject to less wear than have other such deposits in the area. While this may well make it more desirable for use as a concrete aggregate than other nearby deposits used for the same purpose, we cannot agree that it is a unique quality.

18 IBLA at 124, 125, 81 I.D. at 692-693.

Thus the various attributes of this deposit are not sufficient by themselves to define the deposit as having a property giving it a special and distinct value. It can be found unique only if its characteristics give it a substantial economic advantage over other deposits which can be used for the same purposes. Since there is no indication in the record that the material as a finished product sells for more than any other material used for the same purpose, it generally would be an uncommon variety only if its production costs are so substantially less than that of other materials with which it is competitive that it yields the claimant a substantially higher profit.

Here, however, the claimant neither sells the material on the market nor produces it. Instead he derives income from it by receiving a royalty up to 36 cents per ton. If McCormick produced

and sold the material from the claim himself, we could compare his costs of production with those of other producers and determine at least initially whether the special attributes lowered his production costs enough to yield him a substantially higher profit than his competitors earned. However, when the claimant is not a producer but only a royalty recipient, the production cost concept is not directly applicable to him, since he does not bear the other costs of producing a marketable product. However, as is set out below, comparison of the cost of producing from this deposit with that of producing from others is vital to a determination of the validity of the claims. Among the costs of production is the royalty paid to the owner of the deposit.

Viewed in the light most favorable to McCormick, the record shows he received 30 to 36 cents per ton royalty whereas other nearby pits received 20 or 25 cents per ton. The issue then is whether this differential of 5 to 15 cents per ton is substantial. Considered in a relation to the other royalties it may seem so. But the uncommonness of a mineral deposit cannot be determined by examining only one portion of the cost of extracting the material. To determine whether a deposit is or is not a common variety, we must examine the costs and profits incurred in and derived from the entire operation necessary to place the material in condition to have it ready for loading and shipping off the claim. Overburden must be stripped, the materials then blasted or ripped, where necessary, and crushed and screened. Only when the costs of the necessary operations are ascertained can we compare one deposit with another to determine their relative profitability. There is no evidence that the material from the Oleary claim is used for purposes different from or sells for more than that of material from other claims. We must then turn to an examination of production costs.

Since McCormick's income from the claim is only the royalty, then all the special monetary value of the deposit must be reflected and incorporated in his royalty. We may visualize how this would operate if we imagine there are two pits, one A from which materials can be produced at, for example, $ 2 a ton and another pit, B, from which material must be more extensively processed so that the production cost is $ 3 a ton. All other considerations being equal, A should be able to demand a royalty approaching $ 1 from any processor who wishes to use his material. That is it would be a processor's advantage to pay up to that amount to use A's material rather than B's, because at anything less than $ 1, that processor's total cost of production would be less. Presumably, A's royalty would be something less than $ 1 to induce the processor to deal with him.

Applying this concept to the facts in this case, we find that the difference in royalty between McCormick's pit and that

of other competing pits from which material could be processed to specifications was not more than 16 cents a ton. McCormick received at most a royalty of 36 cents a ton (Tr. 404), while the Summit and Fisher pits received 20 to 30 cents per ton (id.). As to Bell, the 36 cents per ton royalty was payable only on the first 4,000 tons; thereafter the rate dropped to 25 cents (Exh. 8, page 3).

In other words, all the unusual characteristics attributed to the McCormick pit were worth from 6 to 16 cents a ton. Presumably if McCormick had sought a higher royalty, it would have been economically advantageous for the purchaser to use other material which could be brought up to specifications by further processing.

We must constantly bear in mind that the end product, a mineral aggregate or sealcoating chips, can be produced from material available at other pits. A processor uses whatever material is available which meets or can be brought to specification and delivered to the job site at the least cost to him (Tr. 443). I note that when Bell was prevented from using the McCormick pit, he was able to produce material from the Bleak pit, to which he added an anti-strip agent to the asphalt (Tr. 411). The record does not indicate how much the extra procedure increased his costs. Nor does the record present a clear picture of what pit mining costs are. Shearer, a road construction contractor, stated that he had paid $ 1.50 per ton at the Bleak-Fisher pit site for crushed and sized material for use as an aggregate base course (Tr. 235). But he said this material was a by-product of a concrete aggregate process (Tr. 236). Shearer, another contractor, paid $ 1.25 (Tr. 349). There was other evidence as to screening and crushing costs amounting to approximately 27 cents and 80 to 87 cents, respectively (Tr. 349, 387). The only evidence of the cost of excavating the material on the Oleary claims, was McCormick's testimony that he would load his material on a purchaser's truck for 50 cents a ton. It plainly was less than on other claims where drilling and blasting or ripping and crushing are necessary (Tr. 386, 439).

We are then left with the conclusion that other material usable for the same purposes as the Oleary materials is available for approximately $ 1.50 a ton or less and that the Oleary material commands a royalty of 5 to 16 cents beyond that paid for other material. If McCormick were selling a finished product he could charge no more than the competition, but he would gain a greater profit because of his lower costs of production. If the extra royalty he commands reflects these economies of production, as in a free market it must, then his production costs would be not more than 16 cents a ton less and his profits that much higher than those of his competitors on a product selling for about $ 1.50 per ton.

Is this then enough, if it were the only consideration, to bring the case within the McClarty rule? The Administrative Law

Judge held that since McCormick received a royalty higher than that of another competing producer, the deposit was not a common variety of stone. Since in every case where one deposit out of many similar ones is utilized, there must be some economic advantage attributable to the one exploited, the owner of the claim will always be able to exact a portion of that advantage from the operator of the claim. Thus, one owner will always receive a higher royalty than another. But the test is not merely a higher price, but a substantially higher price or substantially greater profits resulting from reduced costs of overhead. In McClarty the evidence of production costs was that McClarty could produce stone at $ 5 a ton, or one-half or one-fourth the cost of his competitors. United States v. McClarty, 17 IBLA 20, 33, 45, 60.

The evidence in this case supports no such dramatic difference in production costs.

McCormick bears the cost of stripping the overburden. He charged 50 cents per cubic yard (2,400 to 2,500 pounds; Tr. 208) for pit run material loaded on the purchaser's truck (Tr. 169). Bell, who pays McCormick 36 cents royalty per ton, screens and crushes the material before using it in his hot mix plant because crushing is necessary to meet most specifications (Tr. 171, 406, 410, 435). Bell was also using material from the Summit pit "because the qualities of the material seem to be good and it is a close haul, and an easy pit to operate" (Tr. 427).

After summarizing the advantages of the McCormick material, Bell said "because of these qualities I am willing to pay a little more royalty for the material" (Tr. 406). He then went on to explain that "through 5 years of searching he had decided that McCormick's pit was the most economical source for [him] that will produce a quality product" (Tr. 442). He would rather pay 36 cents per ton for McCormick's material than 25 cents for Fisher-Bleak material, although they are practically equal distance from his plant (Tr. 439). Having built a stationary-type plant, the cost of hauling material to his plant is very important and makes the McCormick pit his most economical source (Tr. 442).

This evidence, can be summarized as follows: The material from the McCormick pit can be mined more economically than that of other available deposits because it does not require blasting or ripping and can be used in producing asphaltic concrete without adding a stripping agent. Bell, the user, who pays the 36 cents royalty, screens and crushes the McCormick material. Material to meet specifications governing the same uses can be produced from other nearby deposits at an added cost. Having located his stationary plant near the McCormick pit, for economic reasons, it remains to Bell's advantage in minimizing haulage costs to use it. For these reasons he is willing to pay a "little more royalty" for it.

In view of the total costs involved in producing a material from these claims, I conclude that the difference in production costs represented by the higher royalty of 5 to 16 cents per ton, while yielding a higher profit, does not constitute so substantial a higher profit as to remove this deposit from the category of a common variety of sand or stone.

We are also troubled by the significance of the Administrative Law Judge's finding that due to the extensive quantity of the deposit, the claims could be validated for only a part of the area located. It seems somewhat contradictory to find a deposit to be locatable because it is uncommon and yet find that even under extremely generous assumptions as to the future market over a lengthy time period only a fraction of the claims are locatable. What, for example, would be the status of a claim located by another person on the lands eliminated from McCormick's claim?

In United States v. Brubaker, 500 F.2d 200 (Cir. 1974), the court held that the fact that a colored stone used for roofing purposes sold for more than normal gray roofing stone did not qualify it as an uncommon variety if the same stone could be found in many other locations in the same market area and claimant's stone sold for the same price as stone from such other locations. So here the excess of similar material in the immediate area of the Oleary claims may well bring the deposit within the reach of Brubaker, for here too, another locator of the area removed from the Oleary claims would presumably command the same royalty as does McCormick.

I also note my disagreement with Judge Stuebing's personal view, in which Chief Judge Frishberg does not join, as to Judge Luoma's conclusion that only 120 acres of the total claims should be validated. The latter's decision in my view is consistent with our decisions in United States v. Baker, 23 IBLA 319 (1970), and United States v. Charleston Stone Products, 9 IBLA 94 (1973), suit for judicial review pending Charleston Stone Products v. Morton, D. Nev., Civil No. LV-2039-BRT. However, since the holding is not being disturbed, it is unnecessary to discuss the matter at greater length.

For the reasons stated above, I agree with Chief Judge Luoma's decision except insofar as he held portions of the Oleary claims valid. I would find the claims invalid in toto.

Martin Ritvo
Administrative Judge